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To be argued by
HENRY M. WARD.

Supreme Court of the United States,

OCTOBER TERM, 1915.

No. 142.

NARCISO BASSO,
Appellant,

VS.

THE UNITED STATES.

BRIEF FOR APPELLANT.

This case is here on appeal from the Court of Claims upon a question of jurisdiction only. The suit was brought to recover damages for a violation of the claimant's constitutional rights in that he was deprived of his liberty without due process of law. While the suit was brought in July, 1905, and thereafter testimony was taken in behalf of the claimant, the attorney general, in order to have the question of law determined, filed a motion in July, 1913, to dismiss for want of jurisdiction. The motion was granted and judgment rendered that "the defendant's motion to dismiss claimant's petition for want of jurisdiction be sustained, and that the petition of the claimant, Narciso Basso, be * * * dismissed" (p. 12). The court below did

not render any opinion. The only question now before this court is whether or not the court below had jurisdiction of the claim, and that is the only point that will be argued. The facts stated in the petition upon which the jurisdiction of the court was invoked may for the purposes of this appeal be taken as admitted. The petition sets forth that the claimant is a Spanish subject who resided at the time the cause of action accrued and at the time the petition was filed in the Island of Porto Rico (p. 1). The petition then sets forth the cession of Porto Rico to the United States by the treaty of Paris, ratifications of which were exchanged on April 11, 1899 (p. 1), the establishment of a provisional court of the United States for the Department of Porto Rico by the general officer of the United States Army in command of the military forces in that island (p. 2), and that in July, 1899, the claimant was charged before this provisional court with the crime of having imported from the United States into the Island of Porto Rico on April 29, 1899, certain merchandise without having made entry of the same in the custom house and without having paid duty thereon (p. 2). It is further alleged that the claimant was arraigned in July, 1899, pleaded not guilty, and the case was set for trial and that at the trial plaintiff contended that the sections of the Revised Statutes relating to the crime of smuggling were without force and effect in Porto Rico on April 29, 1899, and further that the Island of Porto Rico then was a part of the United States and that there was no warrant of law for imposing any duty on goods brought from the United States into that island at that time (p. 2). The pleas were not allowed, the claimant was found guilty and sentenced to one month's imprisonment. The sentence was carried out, the claimant imprisoned and kept in close confinement for twenty-seven days (p. 2). The petition then sets forth facts upon

which the claimant makes a claim for special damages in the sum of \$2,500 and general damages in the sum of \$7,500 (pp. 2 and 3), and at the conclusion of the petition the claimant sets forth that by virtue of such imprisonment he was deprived of his liberty without due process of law and in violation of the rights secured to him by the Constitution of the United States (p. 3), thus basing his claim upon the Constitution.

FIRST POINT.

The jurisdiction of the Court of Claims over a claim *ex delicto*, founded upon the Constitution of the United States, is supported by the recent decisions of this Court.

Concededly the cause of action not merely "sounds in tort" but is based solely upon the tortious actions of the agents of the United States. The cause of action set forth in the petition is analogous to an action for damages for false imprisonment, and there is no theory of contract liability involved. The claimant's theory of the case is that on April 29, 1899, he had the right, secured to him by the Constitution, to bring his goods from the United States into Porto Rico without the payment of duty. Having this right he was not obliged to make any entry of the goods and therefore could not commit the statutory crime of smuggling with respect to goods brought from the United States. The military court convicted him of a crime, not because of any wrongful decision upon the facts, but because the court erroneously held that a customs tariff was in force as against

importations from the United States, and that therefore goods coming from the United States must be entered and duty paid, in default of which the crime of smuggling would be committed. It is not contended that the plaintiff had not done the act for which he was held guilty of smuggling, but that the act which he concededly did, that is, the bringing of goods from the United States into Porto Rico without making entry thereof, did not constitute a crime, but on the contrary was an act which he had a constitutional right to perform without interference on the part of the agents of the government. This right was properly set up by plea to the court, but the court nevertheless adjudged him guilty, and caused him to be imprisoned and deprived of his liberty for a period of nearly thirty days.

In *Ochoa vs. Hernandez*, 230 U. S. 139, the court says with reference to the same order by which the provisional court which rendered the judgment in this case was established:

"Under all the circumstances we deem it clear that the Governor was without authority from the President to make any order judicial in its nature that would have the effect of depriving any person of his property without due process of law " (p. 160).

The case therefore brings up squarely the question as to whether the words in the Tucker Act "in cases not sounding in tort" apply to any other of the classes of claims over which jurisdiction is conferred than those for "damages liquidated or unliquidated."

We submit, in the first place, that this point has been decided in our favor by this Court in the case of *Dooley v. United States*, 182 U. S. 222. In that case, at page 224, this Court says:

"The first section (of the Tucker Act) evidently contemplates four distinct classes of

cases: (1) those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a regulation of an Executive Department; (3) cases of contract, express or implied, with the Government; (4) actions for damages, liquidated or unliquidated, in cases *not sounding in tort*. *The words, 'not sounding in tort,' are in terms referable only to the fourth class of cases.*" (Italics ours.)

The court then reviews a number of cases on jurisdiction under the Tucker Act, and at page 228 says:

"But whether the exactions of these duties were tortious or not; whether it was within the power of the importer to waive the tort and bring suit in the Court of Claims for money had and received as upon an implied contract of the United States to refund the money in case it was illegally exacted, we think the case is one within the first class of cases specified in the Tucker act of claims founded upon a law of Congress, namely, a Revenue Law, in respect to which class of cases the jurisdiction of the Court of Claims under the Tucker act has been repeatedly sustained."

In *United States vs. Lynah*, 188 U. S. 445, Justice Brown wrote a concurring opinion in which citing *Dooley vs. United States*, he stated at page 474:

"While I think the overflowing of the lands in controversy constitutes a taking within the meaning of the fifth amendment to the Constitution, I see no reason for holding that there was an implied contract to pay for them within the meaning of the Tucker Act. The taking appears to me an ordinary case of trespass to real estate containing no element whatever of contract. In such case there can be no waiver of the tort."

and at page 475, he says:

"In my view claims founded upon the Constitution may be prosecuted in the Court of

Claims whether sounding in contract or in tort."

It further appears, from page 479 of the report that Justices Shiras and Peckham concurred in Justice Brown's opinion as well as in the opinion of the court written by Justice Brewer and concurred in by Justice Holmes. The opinion of the court sustained the jurisdiction upon the ground

"that there has been a taking of the lands for public uses, and that the government is under an implied contract to make just compensation therefor" (p. 474).

Justice White wrote the dissenting opinion, in which the Chief Justice and Justice Harlan concurred. At page 480 he says:

"As, in my opinion, the findings of fact do not support the conclusion that the property has been taken by the United States, I dissent both on the subject of jurisdiction and on the merits."

In this opinion, however, it is not contended that the jurisdiction was lacking because the damage suffered by the plaintiff was tortious but because it was a case of *damnum absque injuria*, with respect to which relief could not be had in the courts (p. 484).

We submit that while a majority of the court did not concur in the opinion of Mr. Justice Brown in which he held squarely that claims founded upon the Constitution may be prosecuted in the Court of Claims whether sounding in contract or in tort, nevertheless it follows as a necessary and logical conclusion from the two prevailing opinions in that case that the words "not sounding in tort", as was held in the *Dooley* case, refer only to claims for "damages liquidated or unliquidated" and not to the three other classes of claims over

which jurisdiction is given. This is necessarily so because if the words "not sounding in tort" relate to any one of the three classes of claims preceding those for "damages liquidated or unliquidated," they must necessarily relate to all of them; that is to say, if they relate to claims founded upon the Constitution or to claims founded upon any act of Congress, they must also necessarily relate to claims founded upon contract express or implied. Conversely, if it be demonstrated that they do not relate to any one of these three classes of cases, it must necessarily follow that they do not relate to any of them.

As we have pointed out, this court has held in the *Dooley* case that the words "in cases not sounding in tort" do not apply to claims founded upon any law of Congress. In *United States vs. Lynah*, this court has in effect held that they do not apply to claims founded upon an implied contract with the government of the United States. In the *Lynah* case, four of the justices were of the opinion that *while the acts of the agents of the government were tortious*, yet the claimant might waive the tort and sue the United States upon an implied contract to make just compensation for the claimant's lands which had been taken as a result of the improvement of the river. Mr. Justice Brown in his concurring opinion, in which Justices Shiras and Peckham concurred, held that the act of the agents of the government was a mere trespass upon the claimant's lands and that no contract could be implied. However this may be, it is clear that the acts of the agents of the government toward the claimant upon which his claim was based made the claimant's cause of action a "case sounding in tort", that is to say, a case upon which an action in tort could have been maintained. Necessarily, therefore, the words "in cases not sounding in tort" do not relate to claims founded upon an im-

plied contract with the government of the United States.

This conclusion also necessarily follows from the later cases, such as *United States vs. Welch*, 217 U. S. 333; *United States vs. Grizzard*, 219 U. S. 180; *United States vs. Emery*, 237 U. S. 28, in all of which the jurisdiction of the Court of Claims has been sustained in actions "sounding in tort" but founded upon a law of Congress or upon an implied contract.

In *United States vs. Welch*, 217 U. S. 333, suit was brought against the United States in the Circuit Court under the Tucker Act for damages sustained by the plaintiff, through his land having been flooded by the erection of a dam constructed by the United States government. It was contended by the Attorney-General (pp. 335, 336) that

"No action can be maintained against the United States under the Act of March 3, 1887 (24 Stat. L. 505) to recover damages in the nature of a trespass, whether proximate or consequential, because such action would necessarily 'sound in tort' and therefore without the jurisdiction of the court."

This court, following *United States vs. Lynah*, affirmed the judgment of the trial court, and thus by implication sustained the jurisdiction over a claim sounding in tort but based upon the Constitution.

Jurisdiction was also questioned by the Attorney General in *United States vs. Grizzard*, 219 U. S. 180, in which the judgment of the court below was affirmed. The cause of action was similar to that involved in *United States vs. Welch*.

In *United States vs. Emery*, 237 U. S. 28, at page 32, this court says:

"However gradually the result may have been approached in the earlier cases, it now has become accepted law that claims like the present are 'founded upon' a revenue law. The argument that there is a distinction be-

tween claims 'arising under' * * * and those 'founded upon * * *', a law of the United States rests on the inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye (*Dooley vs. United States*, 282 U. S. 222; *United States vs. Hvoslef*, March 22, 1915; *ante*, p. 1. Jurisdiction was taken for granted in *United States vs. N. Y. and Cuba S. S. Co.*, 200 U. S. 488, and was upheld in *Christie Street Commission Co. vs. United States*, 136 Fed. Rep. 326; *United States vs. Hyams*, 147 Fed. Rep. 1580; *United States vs. Finch*, 201 Fed. Rep. 95, 97)."

The case of *Christie Street Commission Company vs. United States*, 136 Fed. Rep. 326, approved by this court in the *Emery* case just cited, was brought to recover internal taxes illegally collected, and the court (Circuit Court of Appeals for the 8th Circuit) held on page 331 that while the claim was tortious it was founded upon a law of the United States, and therefore the action could be maintained.

In *United States vs. Finch*, 201 Fed. Rep. 95, cited in the *Emery* case, the Circuit Court of Appeals for the Seventh Circuit sustained the jurisdiction with respect to a similar action brought for the recovery of internal revenue taxes.

In *United States vs. Hyams*, 146 Fed. Rep. 15, the Circuit Court of Appeals for the First Circuit points out, on page 18, that the expression found in *Schilling vs. United States*, 155 U. S. 163, 167, that

"Some element of contractual liability must lie at the foundation of any action brought under the Tucker Act",

has been limited if not overruled by more recent cases, notably that of *Dooley vs. United States*, 182 U. S. 222.

The case at bar, involving as it does only the question of jurisdiction affords this court an oppor-

tunity of setting at rest once and for all the contention so frequently urged that the words "not sounding in tort" limit claims founded upon the Constitution or laws of the United States.

As is pointed out in the *Dooley* case (182 U. S. 222), at page 228, in *Hill vs. United States*, 149 U. S. 593, in which jurisdiction was denied on the ground that it was an action sounding in tort, no distinction was made in the opinion between the phraseology of the Tucker Act and that of the act of 1855. Indeed, *Hill vs. United States* must be deemed to have been repealed by implication by the decision in the *Dooley* case, for in the *Hill* case it is said,

"the United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. *Nor can the settled distinction in this respect between contract and tort be evaded by framing the claim as upon an implied contract.*"

It must be conceded that *Schillinger vs. United States*, 155 U. S. 163, holds directly to the contrary of our contention and that we have not the ingenuity to suggest how the court can now decide the case at bar in our favor without at least by implication overruling the *Schillinger* case. In that case Justice Brewer wrote the opinion and in the course of it he says, at page 168, after citing and discussing *Gibbons vs. United States*, 8 Wall. 269, and *Hill vs. United States* (*supra*):

"While the language of the act of 1887 is broader than that of 1855, it is equally clear in withholding such jurisdiction. It added, 'all claims founded upon the Constitution of the United States,' but that does not include claims founded upon torts any more than 'all claims founded upon any law of Congress' found in the prior act. The identity of the descriptive words excludes the thought of any change."

In this opinion the Chief Justice and Justices Field, Gray, Brown, Jackson and White concurred, but Justices Harlan and Shiras dissented in an opinion written by the former, in which he says (p. 179):

"There is another view of the case which is independent of mere contract. The act of March 3, 1887, for the first time gives the Court of Claims jurisdiction to hear and determine 'all claims founded upon the Constitution of the United States' * * * and the claim to have just compensation for such an appropriation of private property to the public use is 'founded upon the Constitution of the United States. *It is none the less a claim of that character, even if the appropriation had its origin in tort.*"

We submit that the *Schillinger* case has been "limited if not overruled" by the more recent decisions of this Court, cited above, and that consequently the proper construction of the Tucker Act is that claims "founded upon the Constitution or any law of the United States" are now within the jurisdiction of the Court of Claims whether based upon contract or tort.

SECOND POINT.

Irrespective of the authority of the recent decisions of this Court our contention is supported by the well settled rules of statutory construction.

It was manifestly the intention of Congress in enacting the Tucker Act to give the Court of Claims jurisdiction of cases "sounding in tort" but

founded upon the Constitution. Jurisdiction of claims upon contract the court already had and the words "founded upon the Constitution" are meaningless unless they apply to torts.

The Court of Claims was created by the Act of February 24, 1855, which provided

"That a court be established to be called a Court of Claims, to consist of three judges * * * and the said court shall hear and determine *all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract expressed or implied with the government of the United States* which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress" (S. L., Vol. 10, p. 612).

These provisions remained in force until they were re-enacted without change of substance by section 1059 of the Revised Statutes, which reads:

"Sec. 1059. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First: All claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress."

Section 1059 remained in force without change until the passage of the Tucker Act on March 3rd, 1887.

It is to be noted that in neither the act of 1855, nor in section 1059, is there any reference *eo nomine* to torts, but it is apparent that "cases sounding in tort" were not included unless founded upon a law of Congress.

On July 4, 1864, Congress passed an act, XIII, Stat. 381, which clearly indicates that up to that time

under the act of 1855, claims "founded upon a law Congress" included claims sounding in tort. This act was entitled

"An act to restrict the jurisdiction of the Court of Claims and to provide for the payment of certain demands," etc.

and it provided

"That the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States growing out of *the destruction or appropriation of or damage to property by the army or navy or any part of the army or navy engaged in the suppression of the rebellion from the commencement to the close thereof.*"

Clearly some at least, if not most of the inhibited claims, would have been "founded upon a law of Congress" and would have sounded in tort.

By the act of March 3, 1887, commonly known as the Tucker Act, 24 U. S. Statutes at Large, 505, Section 1059 was repealed and the jurisdiction of the Court of Claims was enlarged and defined as follows: (We have printed the new matter added to Section 1059 in italics.)

"That the Court of Claims shall have jurisdiction to hear and determine the following matters: First, All claims founded upon *the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States were suable.*"

The effect of the Tucker Act was to continue the jurisdiction first granted in 1855 over "claims founded upon any law of Congress" and "upon any regulation of an executive department" and "upon any contract, expressed or implied, with the government of the United States", and this jurisdiction is conferred with the identical words used in the Act of 1855, and in Section 1059 of the Revised Statutes, but the jurisdiction is extended to include (a) "claims founded upon the Constitution of the United States", and (b) claims "for damages liquidated or unliquidated in cases not sounding in tort", and the jurisdiction is greatly amplified by the general provision embracing all classes of claims specified, that the court shall have jurisdiction of the specified classes of claims "in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States were suable", the words "if the United States were suable" apparently being intended to refer to suits in courts of general jurisdiction at law, in equity or in admiralty. We submit that it is a manifest absurdity to say that when Congress added to the classes of claims over which the court was given jurisdiction "claims founded upon the Constitution" and claims "for damages liquidated or unliquidated in cases not sounding in tort", it intended that the words "in cases not sounding in tort" should limit and restrict the jurisdiction over claims founded upon a law of Congress or claims upon implied contracts over which the court had been granted jurisdiction more than thirty years before. It is a matter of common knowledge that it was the intention of Congress in enacting the Tucker Act not in any way to restrict the jurisdiction of the court, but greatly to increase it, and the words "for damages liquidated or unliq-

uidated in cases not sounding in tort" were inserted so as to embrace claims with respect to which a doubt might arise as to whether a contract could be implied and not to restrict, limit or qualify the grant of jurisdiction over "claims founded upon the Constitution" "in respect of which claims the party would be entitled to redress against the United States—if the United States were suable".

The construction of the Tucker Act, for which we contend, gives effect to its language but does not extend the jurisdiction of the Court of Claims to embrace all torts committed by agents of the Government.

It is only for tortious acts, as a result of which claimant is deprived of some right secured him by the Constitution or laws of the United States, that he can obtain redress. There is the clearest distinction between such violations of constitutional rights and ordinary torts. A passenger in an elevator in a government building is injured through the negligence of the operator. He has no redress against the Government but his constitutional rights have not been violated. A government wagon runs over a person in the street—he has no redress. Guns are fired from government forts over claimant's property—he has no redress (*Peabody vs. United States*, 291 U. S. 530). Ordinary torts such as these are clearly omitted from the grant of jurisdiction; but where, as in the case at bar, the officers of the Government by a misconstruction of the law deprive a man of his liberty in violation of his constitutional rights, his claim is founded on the Constitution and he has the same right of redress as those whose money was taken in payment of customs duties under the same misconstruction of the law.

THIRD POINT.

**The judgment of the Court of Claims
should be reversed and the case re-
manded for hearing upon the merits.**

December, 1915.

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